

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

STATE OF MISSISSIPPI, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services,
et al.,

Defendants.

Civil Action No. 1:22-cv-00113-HSO-RPM

ANSWER TO FIRST AMENDED COMPLAINT

Defendants, by and through counsel, hereby answer Plaintiffs' First Amended Complaint (ECF No. 28) as follows:

FIRST DEFENSE

The Court lacks subject-matter jurisdiction over Plaintiffs' claims.

SECOND DEFENSE

Review of Plaintiffs' claims is barred by 42 U.S.C. § 1395w-4(q)(13)(B).

Defendants answer and respond to each paragraph of Plaintiffs' First Amended Complaint as follows:

The first unnumbered paragraph consists of Plaintiffs' characterization of this lawsuit, to which no response is required.

1. Paragraph 1 consists of conclusions of law, to which no response is required.

2. Paragraph 2 consists of Plaintiffs' characterizations of the cited book, to which no response is required. Defendants respectfully refer the Court to that book for a full and accurate statement of its contents.

3. The second sentence of paragraph 3 consists of Plaintiffs' legal conclusions and characterizations of the cited Federal Register document, to which no response is required. The remaining allegations in this paragraph are denied.

4. Paragraph 4 consists of Plaintiffs' characterizations of the cited rule, to which no response is required. Defendants respectfully refer the Court to that rule, 86 Fed. Reg. 64,996, 65,969 (Nov. 19, 2021), for a full and accurate statement of its contents.

5. Paragraph 5 consists of conclusions of law, to which no response is required but, to the extent a response is required, denied.

6. The first four sentences in paragraph 6 are denied. The fifth and sixth sentences of this paragraph consist of Plaintiffs' characterization of this lawsuit and conclusions of law, to which no response is required but, to the extent a response is required, denied.

7.-10. Plaintiff Dr. Amber Colville has been dismissed from the lawsuit (ECF No. 52) and therefore no response to these paragraphs is required.

11. Paragraph 11 consists of Plaintiffs' characterizations of the plaintiffs in this lawsuit, to which no response is required, except to note that the State of Arizona has voluntarily dismissed itself from this suit (ECF No. 58).

12. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 12. Defendants deny the remaining allegations in this paragraph.

13. Paragraph 13 consists of conclusions of law, to which no response is required but, to the extent a response is required, denied.

14. Defendants admit that Defendant Xavier Becerra is Secretary of Health and Human Services. The remainder of this paragraph consists of Plaintiffs' characterizations of this lawsuit, to which no response is required.

15. Admitted.

16. Defendants admit that Defendant Chiquita Brooks-LaSure is the Administrator of the Centers for Medicare & Medicaid Services and that she approved the rule published at 86 Fed. Reg. 64,996. The remainder of this paragraph consists of Plaintiffs' characterizations of this lawsuit, to which no response is required.

17. Defendants admit the first sentence of paragraph 17, except to note the name of the agency is the Centers for Medicare & Medicaid Services. As to the second sentence, Defendants admit that CMS is responsible for federally administering Medicare and that it promulgated the final rule published at 86 Fed. Reg. 64,996. The remainder of this paragraph consists of Plaintiffs' characterization of this lawsuit, to which no response is required.

18. Admitted.

19. Paragraph 19 consists of conclusions of law, to which no response is required but, to the extent a response is required, denied.

20. Paragraph 20 consists of conclusions of law, to which no response is required but, to the extent a response is required, denied.

21. Paragraph 21 consists of conclusions of law, to which no response is required but, to the extent a response is required, denied.

22.-24. These paragraphs consist of conclusions of law, to which no response is required.

25. The first sentence of paragraph 25 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited act for a full and accurate statement of its contents. The second sentence and following citations consist of Plaintiffs' characterizations of the cited congressional documents, to which no response is required. Defendants respectfully refer the Court to the cited documents for a full and accurate statement of their contents.

26. The first sentence of paragraph 26 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents. The second and third sentences consist of Plaintiffs' characterizations of the cited Federal Register document, to which no response is required. Defendants respectfully refer the Court to that document for a full and accurate statement of its contents.

27. The first and second sentences of paragraph 27 consist of Plaintiffs' generalized summary and characterization of the MIPS statute, to which no response is required. Defendants respectfully refer the Court to MIPS statute, 42 U.S.C. § 1395w-4(q), for a full and accurate statement of its contents and deny any allegations inconsistent therewith. Defendants admit the third and fourth sentences of this paragraph to the extent they apply to MIPS eligible clinicians.

28. Paragraph 28 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents.

29. Paragraph 29 consist of Plaintiffs' generalized summary and characterization of the MIPS statute, to which no response is required. Defendants respectfully refer the Court to

MIPS statute, 42 U.S.C. § 1395w-4(q), for a full and accurate statement of its contents and deny any allegations inconsistent therewith.

30. Paragraph 30 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents.

31. Paragraph 31 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents.

32. Paragraph 32 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited authorities for a full and accurate statement of their contents.

33. Defendants admit that MIPS eligible clinicians must participate and that 99.9999% of MIPS eligible clinicians participated in MIPS in the 2020 performance year but deny the remainder of the first sentence of paragraph 33 as to other performance years. Defendants admit the second sentence of this paragraph.

34. Paragraph 34 consists of conclusions of law and Plaintiffs' characterizations of an uncited document, to which no response is required.

35. Denied.

36. Defendants admit that certain MIPS improvement activities are applicable to a particular specialty but deny the allegations in the first sentence of paragraph 36 that this is true of "many" such activities. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph, except to deny that "two-thirds of

the MIPS categories are either too difficult for most clinicians to satisfy or would be impractical to ask of clinicians because they contravene best medical practices.”

37. Defendants admit the first sentence of paragraph 37. The second and third sentences of this paragraph are denied.

38. The first sentence of paragraph 38 consists of conclusions of law, to which no response is required. Defendants respectfully refer the Court to the cited statute for a full and accurate statement of its contents. Defendants deny the second sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of this paragraph.

39. The first and second sentences of paragraph 39 consist of conclusions of law, to which no response is required, except to deny that the statutory citation is an accurate citation to any portion of the MIPS statute. Defendants respectfully refer the Court to the MIPS statute for a full and accurate statement of its contents. Defendants deny the last sentence of this paragraph, except to admit that for the 2019 through 2024 MIPS payment years MIPS eligible clinicians could see bonus amounts decrease if more eligible clinicians achieve high MIPS scores.

40. Paragraph 40 consists of Plaintiffs’ characterizations of the cited Federal Register document, to which no response is required but, to the extent a response is required, Defendants deny that “Achieving Health Equity” was added as an “improvement activity” rather than as a new subcategory of the improvement activities performance category. Defendants respectfully refer the Court to the cited Federal Register document for a full and accurate statement of its contents.

41. Paragraph 41 consists of Plaintiffs’ characterizations of the cited Federal Register document, to which no response is required but, to the extent a response is required, denied.

Defendants respectfully refer the Court to the cited Federal Register document for a full and accurate statement of its contents.

42. Paragraph 42 consists of Plaintiffs' characterizations of the cited Federal Register document, to which no response is required but, to the extent a response is required, denied. Defendants respectfully refer the Court to the cited Federal Register document for a full and accurate statement of its contents.

43. Defendants admit that President Biden issued Executive Order 13985 on January 20, 2021. The remainder of this paragraph consists of Plaintiffs' characterizations of that Executive Order, to which no response is required. Defendants respectfully refer the Court to the Executive Order for a full and accurate statement of its contents.

44. Defendants admit that CMS published a proposed rule on July 23, 2021, that among other things proposed creating a new clinical practice improvement activity called "create and implement an anti-racism plan." The remaining allegations in paragraph 44 consist of Plaintiffs' characterizations of the cited proposed rule, to which no response is required. Defendants respectfully refer the Court to the cited proposed rule for a full and accurate statement of its contents.

45. Defendants admit that CMS published a final rule on November 19, 2021, that among other things adopted the new clinical practice improvement activity called "create and implement an anti-racism plan." The remaining allegations in paragraph 45 consist of Plaintiffs' characterizations of the cited final rule, to which no response is required. Defendants respectfully refer the Court to the cited final rule for a full and accurate statement of its contents.

46. Paragraph 46 consists of Plaintiffs' characterizations of the cited final rule, to which no response is required. Defendants respectfully refer the Court to the cited final rule for a full and accurate statement of its contents.

47. The first and second sentences of paragraph 47 consist of Plaintiffs' characterizations of the cited final rule, to which no response is required. Defendants respectfully refer the Court to the cited final rule for a full and accurate statement of its contents. The last sentence of this paragraph consists of conclusions of law, to which no response is required.

48. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. Defendants admit that the Secretary made the quoted statement in an April 2022 congressional hearing but deny the remainder of the allegations in paragraph 49.

50. Defendants admit that the clinical practice improvement activity called "create and implement an anti-racism plan" first became available for the performance year ending on December 31, 2022. Plaintiffs' characterization of this performance activity as the "Anti-Racism Rule" does not require a response. As to the second sentence of this paragraph, Defendants admit that MIPS reports for the 2022 performance year were submitted between January 1, 2023, and March 31, 2023.

51. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51 because Plaintiffs do not define "many," but Defendants admit that a number of individual clinicians and groups have attested to completing the activity to create and implement an anti-racism plan for the 2022 performance year.

52. Defendants admit the allegations in the first sentence of paragraph 52 that the activity to create and implement an anti-racism plan is one of two high-weighted activities of the seven newly added activities; otherwise denied. Defendants deny the second sentence of this paragraph.

53. Defendants admit that the clinical practice improvement activity called “create and implement an anti-racism plan” is not constrained to certain specialties or practices but lack knowledge or information sufficient to form a belief as to the truth of the allegation that this activity is available to “more” clinicians. Defendants deny the allegations in the second sentence of this paragraph.

54. The first and third sentences of paragraph 54 consist of Plaintiffs’ characterizations of the cited final rule, to which no response is required. Defendants respectfully refer the Court to the cited final rule for a full and accurate statement of its contents. As to the second sentence of this paragraph, Defendants admit that CMS has developed a tool called the Disparities Impact Statement; the remainder of the second sentence of paragraph 54 consists of Plaintiffs’ characterization of the cited Disparities Impact Statement and of its mention in the final rule, to which no response is required. Defendants respectfully refer the Court to the cited Disparities Impact Statement and to the final rule for a full and accurate statement of their contents. The last sentence of this paragraph consists of Plaintiffs’ characterizations of the cited letter, to which no response is required. Defendants respectfully refer the Court to the cited letter for a full and accurate statement of its contents.

55. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. Defendants lack knowledge or information sufficient to form a belief as to the truth of the first two sentences in paragraph 56. Defendants deny the last sentence of this paragraph.

57. Defendants incorporate by reference their answers and defenses asserted above to paragraphs 1 through 56 of the First Amended Complaint.

58. Paragraph 58 consists of Plaintiffs' conclusions of law, to which no response is required but, to the extent a response is required, denied.

59. Paragraph 59 consists of Plaintiffs' conclusions of law, to which no response is required.

60.-65. Paragraphs 60-65 consist of Plaintiffs' conclusions of law, to which no response is required but, to the extent a response is required, denied.

The remaining paragraphs of the First Amended Complaint contain Plaintiffs' requested relief, to which no response is required. To the extent a response is required, Defendants deny the allegations contained in the remaining paragraphs of the First Amended Complaint and further aver that Plaintiffs are not entitled to any relief.

Defendants hereby deny all allegations in the First Amended Complaint not expressly admitted or denied.

WHEREFORE, having fully answered the First Amended Complaint, Defendants assert that Plaintiffs are not entitled to the relief requested and respectfully request that the Court enter judgment dismissing this action with prejudice and awarding Defendants costs and such other relief as the Court may deem appropriate.

Dated: May 11, 2023

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